

# **EXHIBIT “C”**

1 DANA L. CHRISTENSEN  
DALE R. COCKRELL  
2 Christensen, Moore, Cockrell,  
Cummings & Axelberg, P.C.  
3 P.O. Box 7370  
Kalispell, MT 59904-0370  
4 Telephone: (406) 751-6000  
Facsimile: (406) 756-6522  
5

6 THOMAS G. BOWE  
Assistant Attorney General  
Agency Legal Services Bureau  
7 1712 Ninth Avenue  
P.O. Box 201440  
8 Helena, MT 59620-1440  
Telephone: (406) 444-2026  
9 Facsimile: (406) 444-4303

10 COUNSEL FOR DEFENDANT STATE OF MONTANA  
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12 **MONTANA FIRST JUDICIAL DISTRICT COURT**  
**LEWIS AND CLARK COUNTY**  
13

14 HERBERT R. ORR and SANDRA G.  
ORR, husband and wife,

15 Plaintiffs,

16 v.

17 STATE OF MONTANA, a  
governmental  
18 entity,

19 Defendant, and  
20 Third-Party  
Plaintiff,

21 v.

22 W.R. GRACE & CO. - CONN.,  
W.R. Grace & CO. (NEW YORK),  
23 W.R. GRACE & CO. (DELAWARE),

24 Third-Party  
25 Defendants.

CAUSE NO. BDV-2001-423

**THIRD-PARTY COMPLAINT**

1        1.     Plaintiffs, Herbert R. Orr and Sandra G. Orr, have  
2     filed against Defendant, State of Montana, an amended  
3     complaint, a copy of which is hereto attached as Exhibit A.

4        2.     Third-Party Defendant W.R. Grace & Co. - Conn. is a  
5     for profit business corporation organized and existing under  
6     the laws of the State of Connecticut.

7        3.     Third-Party Defendant W.R. Grace & Co. - Conn. is a  
8     a successor corporation that is liable for the conduct of  
9     Zonolite Company and for the conduct of W.R. Grace & Co., a  
10    Connecticut corporation, with respect to the claims of the  
11    amended complaint arising from the mining and processing of  
12    asbestos-contaminated vermiculite within the State of  
13    Montana.

14       4.     Third-Party Defendant W.R. Grace & Co. (New York)  
15    is a for profit business corporation organized and existing  
16    under the laws of the State of New York and is liable for the  
17    conduct of the predecessor and subsidiary companies,  
18    including W.R. Grace & Co. - Conn. and Zonolite Company with  
19    respect to the claims of the amended complaint.

20       5.     Third-Party Defendant W.R. Grace & Co. (Delaware)  
21    is a for profit business corporation organized and existing  
22    under the laws of the State of Delaware and is liable for the  
23    conduct of the predecessor and subsidiary companies,  
24    including W.R. Grace & Co. - Conn. and Zonolite Company with  
25    respect to the claims of the amended complaint.

26       6.     Third-Party Defendants W. R. Grace & Co. - Conn.  
27    and W.R. Grace & Co. (New York) and W.R. Grace & Co.

1 (Delaware) may be referred to herein as the "Grace Third-  
2 Party Defendants."

3 7. Pursuant to the Agreement and Plan of  
4 Reorganization between W.R. Grace & Co. and Zonolite Company,  
5 dated January 17, 1963, W.R. Grace & Co., a Connecticut  
6 corporation, acquired substantially all of the properties and  
7 assets of Zonolite, including mining properties in Montana,  
8 and assumed all debts and liabilities of Zonolite.

9 8. Without admitting any of the allegations of the  
10 amended complaint, the State of Montana (which may be  
11 referred to herein as "Defendant/Third-Party Plaintiff"),  
12 refers to, and incorporates in this Third-Party Complaint by  
13 reference, the amended complaint for damages filed in this  
14 matter.

15 9. Defendant/Third-Party Plaintiff denies that it is  
16 in any manner responsible for the events giving rise to  
17 Plaintiffs' claims for relief, or for injuries and damages  
18 allegedly sustained by Plaintiffs. If, however, liability is  
19 imposed on Defendant/Third-Party Plaintiff as a result of the  
20 matters alleged in the amended complaint, such liability  
21 could only be remote and derivative from, or concurrent with,  
22 the acts and liability of the Grace Third-Party Defendants.

23 10. The Grace Third-Party Defendants had a duty to  
24 furnish a place of employment that was safe for employees,  
25 including Plaintiff Herbert R. Orr.

26 11. The Grace Third-Party Defendants had a duty to  
27 furnish and require the use of safety devices and safeguards,

1 such as respiratory protective devices, by employees,  
2 including Plaintiff Herbert R. Orr.

3 12. The Grace Third-Party Defendants had a duty to  
4 adopt and use such methods, processes, practices, means, and  
5 operations as reasonably adequate to render the place of  
6 employment safe, and to do every other thing reasonably  
7 necessary to protect the life and safety of employees,  
8 including Plaintiff Herbert R. Orr.

9 13. Defendant/Third-Party Plaintiff alleges that the  
10 Grace Third-Party Defendants negligently and intentionally  
11 breached the aforementioned duties, and that the breach was  
12 the proximate cause of the alleged injuries and damages of  
13 the Plaintiffs.

14 14. The Grace Third-Party Defendants knew that  
15 Plaintiff Herbert R. Orr and other employees were being  
16 exposed to dust containing harmful asbestos, which penetrated  
17 and lodged in their lungs and injured and damaged their  
18 lungs.

19 15. The Grace Third-Party Defendants actively concealed  
20 from Plaintiffs, other employees, and Defendant/Third-Party  
21 Plaintiff the harm and injury caused by dust containing  
22 asbestos.

23 16. The Grace Third-Party Defendants knew that dust  
24 containing hazardous asbestos could cause fatal diseases,  
25 including, but not limited to, asbestosis, lung cancer, and  
26 mesothelioma.

27 17. The Grace Third-Party Defendants knew that safety

1 devices and safeguards, such as respiratory protective  
2 devices and ventilation systems in the workplace, were not  
3 used or maintained in a manner sufficient to prevent injury  
4 from asbestos dust.

5 18. The Grace Third-Party Defendants completely  
6 controlled the methods, processes, practices, means, and  
7 operations in the place of employment, but intentionally  
8 created harm to Plaintiff Herbert R. Orr and other employees  
9 by failing to take reasonably adequate measures to render the  
10 place of employment safe, and to do every other thing  
11 reasonably necessary to protect the life and safety of  
12 employees, including Plaintiff Herbert R. Orr.

13 19. The Grace Third-Party Defendants informed  
14 Defendant/Third-Party Plaintiff of policies it had  
15 implemented concerning the use of respiratory protective  
16 devices by employees, but the Grace Third-Party Defendants  
17 knowingly failed to enforce its policies in a manner  
18 reasonably necessary to protect the life and safety of  
19 employees from injury caused by asbestos dust.

20 20. The Grace Third-Party Defendants failed to warn  
21 Plaintiff Herbert R. Orr, and other employees, and members of  
22 their households of the hazards of exposure to asbestos dust.

23 21. The Grace Third-Party Defendants had knowledge of  
24 facts or intentionally disregarded facts that created a high  
25 probability of harm to Plaintiffs and deliberately proceeded  
26 to act with either conscious disregard or indifference to the  
27 high probability of injury to the Plaintiffs.

1        22. The acts and omissions of the Grace Third-Party  
2 Defendants were the direct and primary causes of the failure  
3 to provide a safe place of employment for Plaintiff Herbert  
4 R. Orr, and other employees, and proximately caused the  
5 injuries and damages allegedly sustained by Plaintiffs.

6        23. The allegations of the amended complaint against  
7 Defendant/Third-Party Plaintiff are, in fact and in law,  
8 vicarious in that Defendant/Third-Party Plaintiff had no  
9 authority, nor did Defendant/Third-Party Plaintiff exercise  
10 any control, over the methods, processes, practices, means,  
11 and operations in the place of employment operated by the  
12 Grace Third-Party Defendants. Defendant/Third-Party  
13 Plaintiff did not increase the risk of harm from asbestos  
14 dust over the risk of harm caused by the Grace Third-Party  
15 Defendants.

16        24. In the event that Plaintiffs are entitled to any  
17 recovery against Defendant/Third-Party Plaintiff by reason of  
18 the matters alleged in the amended complaint, it is because  
19 of the fault and neglect of the Grace Third-Party Defendants.

20        25. In the event that Plaintiffs are entitled to any  
21 recovery against Defendant/Third-Party Plaintiff by reason of  
22 the matters alleged in the amended complaint, then  
23 Defendant/Third-Party Plaintiff is entitled to judgment  
24 against the Grace Third-Party Defendants for all or part of  
25 the amount of damages and costs awarded to Plaintiffs.

26                    **FIRST CLAIM FOR RELIEF**

27        26. Defendant/Third-Party Plaintiff refers to

1 Paragraphs 1 through 25 of this Third-Party Complaint and  
2 incorporates the same herein by reference.

3 27. If Defendant/Third-Party Plaintiff is held liable  
4 and responsible to Plaintiffs for damages as a result of the  
5 matters alleged in the amended complaint, it will be solely  
6 due to the active and affirmative conduct of the Grace Third-  
7 Party Defendants, which directly and proximately caused any  
8 injuries, as herein alleged.

9 28. As between the Grace Third-Party Defendants and  
10 Defendant/Third-Party Plaintiff, the Grace Third-Party  
11 Defendants are primarily, directly, and actively responsible  
12 for the resulting injuries and damages to Plaintiffs, and  
13 Defendant/Third-Party Plaintiff is not responsible or is only  
14 secondarily, indirectly, and passively responsible.

15 29. Therefore, Defendant/Third-Party Plaintiff is  
16 entitled to be indemnified by the Grace Third-Party  
17 Defendants in the full amount of any damages awarded to  
18 Plaintiffs, should such liability to Plaintiffs arise.

19 **SECOND CLAIM FOR RELIEF**

20 30. Defendant/Third-Party Plaintiff refers to  
21 Paragraphs 1 through 29 of this Third-Party Complaint and  
22 incorporates the same herein by reference.

23 31. If Defendant/Third-Party Plaintiff is held liable  
24 and responsible to Plaintiffs for damages as a result of the  
25 matters alleged in the amended complaint, the Grace Third-  
26 Party Defendants are responsible for Plaintiffs' damages in  
27 proportion to their comparative negligence, and the Grace



1 Third-Party Defendants are liable to Defendant/Third-Party  
2 Plaintiff for all or any liability by way of contribution, to  
3 the extent of their fault, and Defendant/Third-Party  
4 Plaintiff is entitled to a determination of several  
5 liability.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, Defendant/Third-Party Plaintiff requests that  
8 the Court:

9 1. Enter a judgment declaring the rights of  
10 Defendant/Third-Party Plaintiff to total indemnification from  
11 the Grace Third-Party Defendants, and granting judgment  
12 against the Grace Third-Party Defendants for any sum that may  
13 be adjudged in this suit by Plaintiffs against  
14 Defendant/Third-Party Plaintiff.

15 2. Enter a judgment declaring the rights of  
16 Defendant/Third-Party Plaintiff to contribution from the  
17 Grace Third-Party Defendants, and apportioning the liability  
18 of Defendant/Third-Party Plaintiff and the Grace Third-Party  
19 Defendants on the basis of their comparative fault, in the  
20 event that they are liable for the damages alleged in the  
21 Plaintiffs' amended complaint.

22 3. Award Defendant/Third-Party Plaintiff the costs of  
23 suit.

1           4.   Award Defendant/Third-Party Plaintiff any other and  
2 further relief that the Court considers just and proper.

3           DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2005.

4                                   CHRISTENSEN, MOORE, COCKRELL,  
5                                   CUMMINGS & AXELBER, P.C.

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7                                   \_\_\_\_\_  
8                                   Dana. L. Christensen  
9                                   Dale R. Cockrell  
                                  P.O. Box 7370  
                                  Kalispell, MT 59907-0370

10                                  Thomas G. Bowe  
11                                  Assistant Attorney General  
12                                  AGENCY LEGAL SERVICES BUREAU  
13                                  1712 Ninth Avenue  
                                  P.O. Box 201440  
                                  Helena, MT 59620-1440

14                                  COUNSEL FOR DEFENDANT/  
15                                  THIRD-PARTY PLAINTIFF  
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